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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
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No.

DIRECT MAIL ADVERTISING ASSOCIATION, INC.,
ASSOCIATED THIRD CLASS MAIL USERS,
GEM INTERNATIONAL, INC.,

*Petitioners,*

v.

UNITED STATES POSTAL SERVICE, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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# TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| ISSUES PRESENTED | 2 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| The Statutory Framework | 3 |
| The Phasing Requirement | 5 |
| Events Leading to This Suit | 6 |
| Proceedings Below | 8 |
| REASONS FOR GRANTING THE WRIT | 9 |
| This Case Presents An Important And Novel Question Of Statutory Interpretation Which Is Important To The Proper Administration Of The Postal Reorganization Act | 9 |
| CONCLUSION | 17 |
| APPENDIX A | 1a |
| APPENDIX B | 1b |
| APPENDIX C | 1c |
| APPENDIX D | 1d |
| APPENDIX E | 1e |


# TABLE OF CITATIONS

*Cases:*


| | |
|---|---|
| Arkadelphia Milling Co. v. St. Louis Southwestern Ry., 249 U.S. 134 (1919) | 6 |
| Atlantic Coast Line R.R. v. Florida, 295 U.S. 301 (1935) | 6 |
| Baltimore & O. R.R. v. United States, 279 U.S. 781 (1929) | 6 |
| Boys Market, Inc. v. Retail Clerks Union, 398 U.S. 235, 250 (1970) | 10 |
| Richards v. United States, 369 U.S. 1, 11 (1962) | 10 |

United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223, 229 (1965) . . . . . 6

United States v. Hutcheson, 312 U.S. 219, 235 (1941) . . . . . 10

*Statutes and Rules:*

Pub. L. 92-49, 85 Stat. 108 (1971) . . . . . 6

Communications Act of 1934:
47 U.S.C. §203(b) . . . . . 13
47 U.S.C. §204 . . . . . 13

Federal Aviation Act:
49 U.S.C. §1373(c) . . . . . 13
49 U.S.C. §1482(g) . . . . . 13

Federal Power Act:
16 U.S.C. §824d.(d)(e) . . . . . 13

Intercoastal Shipping Act:
46 U.S.C. §844 . . . . . 13
46 U.S.C. §945 . . . . . 13

Interstate Commerce Act:
49 U.S.C. §316(g) . . . . . 13
49 U.S.C. §318(a) . . . . . 13
49 U.S.C. §906(e) . . . . . 13
49 U.S.C. §907(g) . . . . . 13

Judicial Code:
28 U.S.C. §1254(1) . . . . . 2

Natural Gas Act:
15 U.S.C. §717c(d)(e) . . . . . 13

Postal Reorganization Act of 1970, 39 U.S.C. §§101 *et seq.*:
39 U.S.C. §102 . . . . . 4
39 U.S.C. §202 . . . . . 4
39 U.S.C. §202(c) . . . . . 4
39 U.S.C. §202(d) . . . . . 4
39 U.S.C. §203 . . . . . 4
39 U.S.C. §205 . . . . . 4
39 U.S.C. §2004 . . . . . 5
39 U.S.C. §2005 . . . . . 12
39 U.S.C. §2401(b) . . . . . 5, 11
39 U.S.C. §2401(c) . . . . . 5, 11
39 U.S.C. §3601-04 . . . . . 4

39 U.S.C. § 3621 ..... 12, 14, 15
39 U.S.C. § 3621-28 ..... 8
39 U.S.C. § 3622(a) ..... 4
39 U.S.C. § 3622(b) ..... 4
39 U.S.C. § 3624(a) ..... 4, 14
39 U.S.C. § 3624(b) ..... 4
39 U.S.C. § 3626 ..... 5, 8, 9, 11
39 U.S.C. § 3627 ..... 5, 7, 8, 12
39 U.S.C. § 3641 ..... 4, 8
39 U.S.C. § 3641(a) ..... 6
39 U.S.C. § 3641(c) ..... 4, 13
39 U.S.C. § 3681 ..... 6

Private Express Statute:
18 U.S.C. §§ 1693-99 ..... 14
18 U.S.C. § 1724 ..... 14

*Legislative Materials:*

S. Rep. No. 91-912, 91st Cong., 2d Sess. (1970) ..... 3, 5
H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. (1970) ..... 13
H.R. Rep. No. 92-290, 92d Cong., 1st Sess. (1971) ..... 12
Hearings on Treasury Post Office and General Government Appropriations for 1972 Before a Subcommittee of the House Committee on Appropriations, 92d Cong., 1st Sess. (1971) ..... 6
Hearings on Revenue Foregone Appropriations Before the Senate Committee on Appropriations, 92d Cong., 1st Sess. (1971) ... 6
Cong. Rec. S. 10032 (daily ed. June 26, 1970) ..... 5
Cong. Rec. S. 10305 (daily ed. June 29, 1971) ..... 7

*Executive Materials:*

Towards Postal Excellence—The Report of the President's Commission on Postal Organization (June 1968) ..... 3
36 Fed. Reg. 14711-12 (August 10, 1971) ..... 7
36 Fed. Reg. 15727 (August 16, 1971) ..... 7
36 Fed. Reg. 16537 (August 21, 1971) ..... 7
36 Fed. Reg. 24953 (December 24, 1971) ..... 7

*Miscellaneous:*

Statement by Assistant Postmaster General (February 2, 1971) . 10

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v.

UNITED STATES POSTAL SERVICE, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Direct Mail Advertising Association, Inc., et al., v. United States Postal Service, et al.*, entered February 22, 1972. That judgment reversed an order of the District Court for the District of Columbia entered January 17, 1972, which granted a summary judgment in favor of the petitioners.

## OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed as Appendix B hereto. (App. 1b-13b) The order for summary judgment by the District Court has not been reported. It is printed as Appendix A hereto. (App. 1a-2a)

## JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1972 and is printed as Appendix C hereto (App. 1c-2c) The Court of Appeals denied a timely petition for rehearing on March 15, 1972; that denial is printed as Appendix D. (App. 1d) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## ISSUES PRESENTED

(1) Under the Postal Reorganization Act, does the requirement for cushioning the impact of certain rate increases by "phasing" them into effect through five equal annual steps also apply to the temporary rates which precede, and may not exceed, the permanent rates which the Postal Service has "requested" the Postal Rate Commission to recommend for adoption?

(2) If so, have the substantive and procedural requirements been met for a modification of phasing for the temporary rates now in effect?

(3) If not, does elimination of phasing in temporary rates for only one class of mail violate the Act's prohibition against unreasonable discrimination?

## STATUTORY PROVISIONS INVOLVED

The provisions of the Postal Reorganization Act of 1970, 39 U.S.C. §§101 *et seq.* (1970), relevant to this case are set forth in Appendix E hereto. (App. 1e-7e)

## STATEMENT OF THE CASE

The Postal Reorganization Act of 1970 created the United States Postal Service to replace the Old Post Office Department and radically revised the procedures and standards by which postal rates should be set. In order to cushion the impact on postal customers of the sharp rate increases which Congress believed would be necessary under the new regime, the Act provides that permanent rate increases for certain classes of mail must be "phased" into effect by equal annual steps over a five or, in some cases, ten year period.

The Postal Service successfully persuaded the Court of Appeals that, contrary to the holding of the District Court, this phasing requirement for permanent rates does not apply to the temporary rates which the Service may institute while permanent rate proposals are being considered by the Postal Rate Commission, the independent administrative agency created by the Act to review proposed permanent rate increases. The effect of this decision has been to allow the Postal Service, without hearings and without outside regulatory supervision, to raise certain temporary rates to a level which, because of phasing, the follow-on permanent rates would not reach for five years. Affected users of the mail have thereby been burdened with a precipitous rate increase of exactly the sort which Congress sought to prevent through the phasing requirement.

### The Statutory Framework

The Postal Reorganization Act sought to take Congress out of the business of setting postal rates in order to eliminate the pressure politics which had in the past distorted the postal rate structure, and to provide instead a means by which postal rates might be impartially set according to professional and business-like standards.[1] Toward this end, the Act

[1] *See* Towards Postal Excellance The Report of the President's Commission on Postal Organization 29-31, 129-32 (1968); S. Rep. No. 91-912, 91st Cong., 2d Sess. at 11 (1970).

creates an independent Postal Rate Commission. 39 U.S.C. §§3601-04. Under the succeeding provisions of the Act, the new Postal Service is required to request the Rate Commission to submit a recommended decision on any changes which the Service believes are appropriate for permanent rates. 39 U.S.C. §3622(a).

Upon receiving such a request, the Commission must hold adjudicatory public hearings to consider whether the rates requested by the Postal Service meet the various ratemaking criteria specifically enumerated in the Act. 39 U.S.C. §§3622(b), 3624(a). The Commission then transmits its recommended decision to the "Governors" of the Postal Service, the nine members of the eleven-member "Board of Governors" appointed by the President "to represent the public interest." 39 U.S.C. §§102, 202, 3624(b).[2]

If the Rate Commission does not transmit a recommended decision to the Governors within 90 days after receiving a request for new permanent rates, the Postal Service is authorized to impose temporary rates which may remain in effect until 30 days after a recommended decision issues. 39 U.S.C. §3641. This authority is limited by Section 3641(c) which provides that a temporary rate:

> "[M]ay not exceed the lesser of (1) the rate or fee requested for such a class . . . or (2) a rate which is more than one-third greater than the permanent rate . . . in effect for that class . . . at the time a permanent change in the rate . . . is requested . . . ."

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[2]The other two members of the "Board of Governors" – which acts roughly as a board of directors for the Postal Service, 39 U.S.C. §§202, 205 – are the Postmaster General and his deputy. 39 U.S.C. §202(c), (d). As the executive officers of the Postal Service responsible for the rate request made to the Commission, 39 U.S.C. §203, these officials are barred from sitting in judgment on the Rate Commission's recommended decision.

**The Phasing Requirement**

Congress anticipated that steep increases would be necessary at the outset when rate-setting was placed on the new basis outlined above. Congress also recognized, however, that such steep rate increases could, if placed into effect immediately, impose severe hardship upon mail users (individuals, businesses and non-profit organizations) whose costs and operations were keyed to the old rates.

To soften the impact of rate increases on these users, Congress provided that any new permanent rates should be phased into operation through a series of five annual steps in the case of commercial second-class, third-class and "special" fourth-class mail[3] and ten annual steps in the case of specified nonprofit mail. 39 U.S.C. §3626.[4]

To provide funds for the revenue foregone by phasing these rates, the Act authorizes Congressional appropriations. 39 U.S.C. §2401(c).[5] If Congress fails to appropriate such sums, the phased rates "may be adjusted in accordance with the provisions of this subchapter [*i.e.*, subchapter II, the subchapter of the Act dealing with permanent rates]." 39 U.S.C. §3627.

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[3]Second-class mail consists principally of magazines and newspapers. "Single-piece" third-class mail consists principally of letters and small packages sent by individuals who are willing to sacrifice priority handling and other special privileges in order to pay a lower rate than for first class mail; "bulk" third-class mail is typically advertising, political and other fund-raising solicitations, and books weighing less than a pound. "Special" fourth-class mail consists of books and records weighing more than one pound.

[4]The purpose of the phasing requirement is explicitly stated in the legislative history of the Act. *See, e.g.*, 116 Cong. Rec. S.10032 (daily ed. June 26, 1970) (remarks of Senator McGee, Chairman, Senate Post Office and Civil Service Committee); S. Rep. No. 91-912, 91st Cong., 2d Sess. at 12 (1970).

[5]The act also authorizes appropriations for several other purposes. 39 U.S.C. §§2401(b), (c), 2004.

**Events Leading to This Suit**

On February 1, 1971, the Postal Service filed a request with the Postal Rate Commission for a recommended decision on increases in permanent rates for almost all major classes of mail.[6] When the Commission failed to complete its proceedings within 90 days, the Service instituted temporary rate changes on May 16, 1971. For all classes of mail eligible for phasing, these temporary rates which with the single exception of third-class rates remain in effect today were uniformly set at the lesser of (1) the first phasing step or (2) a rate one-third higher than the existing rates.

Congress appropriated fiscal year 1972 funds for the Postal Service on July 9, 1971, Pub. L. 92-49, 85 Stat. 108. This appropriation was in a lump sum and nothing on the face of the legislation or in any Committee report or in the remarks of any Congressman segregated a particular amount for any of the several purposes (including phasing) for which the Act authorizes appropriations.[7] Nevertheless, on August 10, the

[6] A recommended decision by the Postal Rate Commission may issue at any time in which case present temporary rates will lapse no more than thirty days later. 39 U.S.C. §3641(a). Although Section 3681 prohibits refunds of unlawful *permanent* rates, the Act contains no such prohibition against refund of unlawful temporary rates and refund is therefore available to affected customers. *See United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). *See also Arkadelphia Milling Co. v. St. Louis Southwestern Ry.*, 249 U.S. 134 (1919); *Baltimore & O. R.R. v. United States*, 279 U.S. 781 (1929); *Atlantic Coast Line R.R. v. Florida*, 295 U.S. 301 (1935).

[7] The President's budget request asked Congress not to appropriate phasing funds for third-class mail and administration witnesses proffered explicit statutory language for that purpose. *See* Hearings on Revenue Foregone Appropriations Before the Senate Committee on Appropriations, 92d Cong., 1st Sess. at 5-6 (1971); Hearings on Treasury, Post Office and General Government Appropriations Before a Subcommittee of the House Committee on Appropriations, 92d Cong., 1st Sess. at 91, 275 (1971). That language was not utilized by the Congress, which simply appropriated a lump sum totaling less than the amount of appropriations requested for all purposes by the Administra-

Postal Service announced in the Federal Register that it did "not attribute any part of this appropriation to the portion of its appropriation requested" for revenue foregone by phasing third-class mail, and that therefore the Service would raise temporary rates for such mail to eliminate phasing "in consonance with Section 3627."[8]

The proposed increases averaged 24%. Temporary rates for all other classes of mail eligible for phasing were to be left at the first step phased level.

The President's price-wage freeze caused a temporary rescission of this announcement, but on December 24, the Postal Service reannounced the increase, again for third-class mail alone.[9]

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tion. This action was accompanied by emphatic statements in the legislative history of the appropriations act that no appropriation for revenue foregone by phasing was being denied. For example, Senator McGee, a member of the Appropriations Subcommittee and Chairman of the Senate Post Office and Civil Service Committee, stated during the floor debate immediately before the Senate unanimously approved the appropriations bill:

> "Our Post Office Committee held a hearing to examine this particular point, and it was our unanimous opinion at the hearing yesterday that the OMB [the Office of Management and Budget] is wrong, that without language specifically allocating funds either in the bill or in the report, there is no justification for the Postal Service to deny the payment of revenue foregone toward the expenses to be borne by any class of mail." 117 Cong. Rec. S. 10305 (daily ed. June 29, 1971).

[8] 36 Fed. Reg. 14711-12 (August 10, 1971). For example, in the case of third-class books-and-catalogues bulk mail the previous permanent rate per pound was 16.0 cents, the new requested permanent rate was 22.0 cents, the temporary rate imposed on May 16, 1971 was equal to the first of five phased steps, 17.0 cents, and this temporary rate was proposed to be raised to 22.0 cents.

[9] 36 Fed. Reg. 15727 (August 16, 1971) (price freeze); 36 Fed. Reg. 16537 (August 21, 1971) (rescission of rate increase by Postal Service); 36 Fed. Reg. 24953 (December 24, 1971) (reannouncement of rate increase).

**Proceedings Below**

The petitioners (henceforth "DMAA") filed this lawsuit on October 12, and promptly moved for summary judgment on November 11. After a brief stay ordered by the District Court until the rate increase emerged from the state of limbo caused by the price freeze, a hearing was held on Jaunary 14 to pass upon DMAA's motion and the Postal Service's cross-motion for dismissal or summary judgment in its favor.

DMAA's argument was straightforward:

(1) the temporary rate provision (Section 3641) of the Act must be read in conjunction with the permanent rate provisions (Sections 3621-28) in order to produce a harmonious interpretation of the statute as a whole;

(2) if this is done, the phasing requirement of Section 3626 must be construed to apply to temporary rates as well as permanent rates if the congressional intent to protect users from immediate sharp rate increases is to be honored;

(3) as a logical corollary, temporary rates may be dephased only in consonance with Section 3627, which requires, *inter alia*, a failure of appropriations for revenue foregone by reason of phasing for the particular class of mail involved—a failure which has not occurred.

The District Court agreed with DMAA, and entered summary judgment in its favor holding that the temporary rate increase "would violate the Postal Reorganization Act by improperly . . . eliminating the phasing requirement for those rates." (App. 1a) The Postal Service appealed and upon expedited consideration the Court of Appeals reversed the order below in an opinion issued on February 22.

The basis for the Court of Appeals' decision was its conclusion that the phasing requirement does not apply at all to the temporary rates involved; having so held, it did not reach the question whether appropriations for phasing had failed. (App. 7b n.9). As explained more fully in the succeeding section, this conclusion was in turn based on a belief that, insofar as the temporary rates involved are

concerned, the congressional purpose to "cushion the impact of new rates by phasing" must be "subordinate[d] to the intent that the Postal Service be as near self-sufficient as possible." (App. 11b). In this connection, the court referred to the language of the phasing provision which (according to the court) suggests that phasing does not come into play until the date of the first permanent rate decision under the new Act, an event which has not yet occurred.

## REASONS FOR GRANTING THE WRIT

### THIS CASE PRESENTS AN IMPORTANT AND NOVEL QUESTION OF STATUTORY INTERPRETATION WHICH IS IMPORTANT TO THE PROPER ADMINISTRATION OF THE POSTAL REORGANIZATION ACT.

This is a case of first impression under the new Postal Reorganization Act. It presents an important question concerning the degree to which the Postal Service can, by exercise of unilateral and unregulated power and without regard to the efficiency of its operations, impose exactly the large, abrupt rate increases from which Congress sought to protect the public.

The phasing provisions which are central to this controversy appear in Section 3626 of the Act, which is part of Subchapter II, which deals with permanent rates. The temporary rate provisions appear in Subchapter III. DMAA argued that, since Section 3626 requires phasing of permanent rates, the Postal Service's "request" for permanent rate increases must as a matter of law involve a request for phased rates; that therefore the phasing requirement limits temporary as well as permanent rates; and that any other construction of the statute would violate Congress' clearly expressed policy to mitigate the impact of rate increases through phasing.

Before this suit was instituted, the Postal Service agreed with this view. As the Assistant Postmaster General publicly stated at the time the rate request was made:

> "Briefly, they will be the maximum temporary rates which we are entitled to implement under the law. This means that they cannot be . . . higher than the first [phasing] step of the specific rates which we proposed to the Rate Commission yesterday." Statement by Assistant Postmaster General at p. 5 (February 2, 1971) (Exhibit 3 to the Complaint).

In this suit, the Postal Service did not dispute the fact that its request was premised on phasing of the requested permanent increases. It argued, however, that it had nevertheless not requested phased rates within the meaning of the temporary rate provisions, that the temporary rate provisions should be interpreted independently of the permanent rate provisions, and that accordingly it could unilaterally eliminate phasing of temporary rates regardless of whether appropriations for phasing had failed, even though it admittedly could not do so with respect to the follow-on permanent rates.

The Court of Appeals adopted this reasoning in reversing the District Court. Instead of interpreting the temporary and permanent rate provisions as an integrated whole,[10] the Court of Appeals applied to the temporary rate provisions a principle which it called "self-sufficiency" – a principle which the court both misunderstood and misapplied in elevating it over all other purposes of the Act insofar as the temporary rates here involved are concerned. In so doing it overrode Congress' explicit purpose to cushion by phasing the impact of rate increases on commercial and non-profit users of second-, third- and fourth-class mail. The court recognized and accepted this Congressional purpose but held that it must be subordinated to "self-sufficiency."

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[10]This Court has often stressed that "statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies" behind the law. *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235, 250 (1970); *accord, e.g., Richards v. United States*, 369 U.S. 1, 11 (1962); *United States v. Hutcheson*, 312 U.S. 219, 235 (1941).

The phrase "self-sufficiency" is the court's own, for it appears nowhere in the Act. If, as use of the word "self" implies, the court meant to indicate that the Postal Service should rely as much as possible on rate-revenues to the exclusion of appropriations, then the Act does indeed set forth that goal but only as a goal to be reached over 13 years. Thus, Section 2401(b) provides for the gradual reduction until fiscal year 1984 of appropriations for so-called "public service" costs.[11] More importantly to this suit, Section 2401(c) provides in conjunction with Section 3626 for a somewhat more rapid reduction in appropriations for phasing. Faced with traditional postal deficits of large proportions and recognizing that to try to shift that deficit from taxpayer to ratepayer in a single stroke would create intolerably large rate increases, Congress, as the foregoing provisions show, adopted a policy of reasonably expeditious gradualism for further increasing the already preponderant contribution of the ratepayers.[12]

The Court of Appeals rejected this clearly expressed limitation upon the policy of self-sufficiency in holding that, regardless of Congress' action on appropriations for phasing, the Postal Service may increase temporary rates above the phased levels in the name of "self-sufficiency."

This holding rests on a misconception of the purpose of the temporary rate provisions. As under comparable regulatory acts, that purpose is to forestall undue loss of the revenue which the permanent rates requested will generate when and if approved by the regulatory commission. Under

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[11] These are costs of those parts of the postal system which are inherently uneconomic but must nevertheless be maintained in order to provide nationwide service (*e.g.*, some rural post offices).

[12] In fiscal year 1970, rate-revenues accounted for about 80 percent of total Post Office Department receipts (including appropriations).

the Court of Appeals' decision, however, the Postal Service is empowered to impose temporarily *not* the rates which will first go into effect if the Rate Commission approves the rates requested, but rather much higher rates which, because of the phasing provision, will not come into play on a permanent basis for five full years.[13]

Although this anomalous result was justified in the name of "self-sufficiency," the statute provides in other ways, ignored by the Court of Appeals, for any unexpected needs the Postal Service may encounter after it has submitted its rate request to the Rate Commission. Section 3621, for example, provides that rate requests shall include a provision for a contingency fund (which the pending rate request in fact did—a contingency fund of some $476 million[14]). Such contingency funds are designed to take care of misestimates and, since they are part of the request, are automatically built into temporary rates. And, if contingency funds should be exhausted, the Postal Service has authority to borrow up to $500 million a year for operating expenses. 39 U.S.C. § 2005. If that authority is exercised, the ratepayers as a whole will eventually pay through amortization. The effect of the Court of Appeals' decision, however, is to permit the Postal Service to impose the same costs on only the users of some classes of mail (*i.e.*, users of classes entitled to phased permanent rates) and to do so abruptly in violation of Congress' explicit purpose to cushion the impact of rate increases.

Throughout the proceedings below, the Postal Service was unable to cite any other ratemaking situation, and we have found none, where the interim or temporary rate power is

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[13]It is possible, of course, that phasing of permanent rates might be modified or eliminated if (1) there has in fact been a failure of appropriations and (2) the Postal Service complies with the requirements of Section 3627; but the possibility of this happening is irrelevant under the approach taken by the Court of Appeals.

[14]*See* H.R. Rep. No. 92-290, 92d Cong., 1st Sess. at 14 (1971).

designed to generate rate-revenues beyond those to be generated by the follow-on permanent rates or where the interim or temporary rate has been permitted to exceed the rate which will first go into effect if the rate request is approved by the regulatory agency. Since the legislative history of the Act shows that Congress patterned the temporary rate provisions after those of other rate-regulating statutes,[15] the novel construction given by the Court of Appeals to the temporary rate power is wholly unwarranted.

Moreover, the major respect in which Congress did *not* pattern the temporary rate provisions on other ratemaking statutes suggests that the limitations on temporary rate power contained in Section 3641(c) should be strictly construed in favor of the public which pays the postage. In other federal regulatory schemes, the regulatory commission may prevent or suspend the introduction of a temporary rate for a substantial period beyond the time it would otherwise go into effect.[16] Here, even if the Postal Rate Commission's preliminary analysis should indicate that the Postal Service's requested rate increases are unreasonable, it has no statutory authority to prevent them from going into effect on a temporary basis once 90 days has passed.

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[15] *E.g.*, H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. at 19 (1970).

[16] Each of the relevant statutes provides that proposed rate increases must be filed with the appropriate regulatory agency, that the increases may not normally go into effect for at least 30 days thereafter, and that the regulatory agency may further suspend their effectiveness for additional periods. The total time (30 days plus the maximum suspension period) during which rate increases may be prevented pending conclusion of the agency's proceedings on the merits, varies as follows: eight months in the Interstate Commerce Act (49 U.S.C. §§316(g), 318(a) and (c), 906(e), 907(g)); seven months in the Federal Aviation Act (49 U.S.C. §§ 1373(c), 1482(g)); six months in the Federal Power Act (16 U.S.C. §§824d.(d) and (e) ); and in the Natural Gas Act (15 U.S.C. §§717c.(d) and (e) ); five months in the Intercoastal Shipping Act (46 U.S.C. §§844, 945); and four months in the Communications Act of 1934 (47 U.S.C. §§203(b), 204).

There are, further, several other reasons to confine the temporary rate power within the conventional limits of other regulatory schemes:

(1) The financial needs which purportedly justify temporary rates are unilaterally determined by the Postal Service, which is hardly an impartial arbiter. As the proceedings before the Rate Commission may subsequently show, these supposed financial needs may be inflated or otherwise inaccurate.[17]

(2) If temporary rates may, as the Court of Appeals has ruled, be higher than the follow-on permanent rates which will first take effect, the Postal Service has an incentive to prolong the proceedings before the Rate Commission, thereby stretching out the duration of the higher temporary rates. The Service is in a particularly good position to do this since it controls most of the data relevant to the proceeding.

(3) To expand the Postal Service's authority over temporary rates as the Court of Appeals has done creates a disincentive to efficiency—a disincentive all the more to be avoided because the Postal Service has a statutory monopoly over delivery of most of the mail.[18] As in any other business situation, incentives to efficiency are inversely related to the degree to which prices can be raised with impunity. It is beyond question that Congress wanted the Postal Service normally to operate on a breakeven basis—that, as Section 3621 states, permanent rates should provide "sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable

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[17] Indeed, in the current proceedings before the Rate Commission, the public defender appointed pursuant to Section 3624(a) of the Act has asserted that the service has overestimated its needs by at least $140 million annually. Even if the temporary rate increase here challenged lasted a year, it would not generate this much revenue.

[18] *See* the Private Express Statutes, 18 U.S.C. §§1693-99, 1724. The effect of these statutes is to make it a crime to transmit or deliver letters outside the postal system except in very limited circumstances.

total estimated costs on the Postal Service."[19] But it is also beyond question that Congress wanted the Postal Service operated efficiently. Thus, Section 3621 places even ahead of the breakeven standard the requirement that rates shall be "sufficient" only "under honest, efficient, and economical management" to maintain and develop postal service.

The Court of Appeals' decision nowhere even mentions the goal of efficiency and its corollary, lower prices. Yet any proper construction of the Act must recognize, as Congress recognized, the need for balancing the goals of financial integrity and efficient operation. Otherwise, the public will suffer either from unreasonably high postal prices, or inadequate service, or excessive calls on general tax revenues, or all three.

(4) Finally, as shown graphically on the next page, the result of the Court of Appeals' decision is an absurd yo-yoing in rates under which temporary rates can be (and have been) increased to a level from which they will plummet back to the phased level when permanent rates become effective.
It is quite true that temporary rates will differ from permanent rates if and to the extent the Postal Service's rate proposals are modified by the review before the Rate Commission. But there is no necessity under the statute to promote the additional, and drastic, upward and downward gyrations in rates which the Court of Appeals' decision explicitly sanctions.

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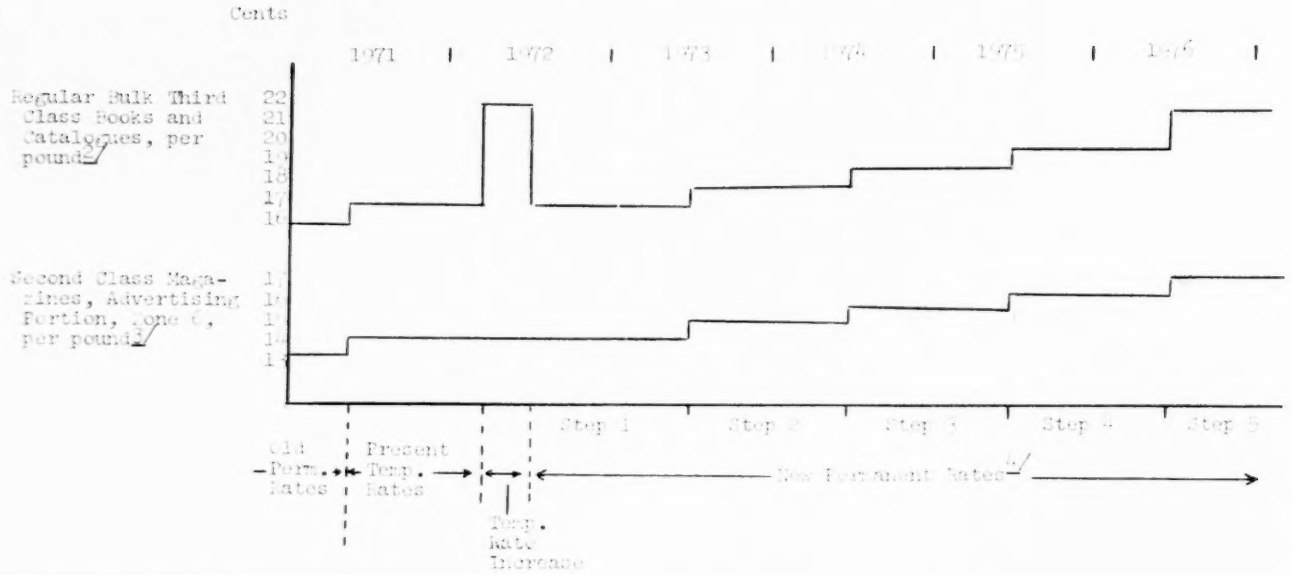
[19] If by "self-sufficiency" the Court of Appeals meant simply to refer to this breakeven standard, the standard's specific language conflicts with the court's holding. As between the sources of income—rate-revenue, other income, and appropriations—the language of Section 3621 is neutral. Yet the court considered the question of failure of *appropriations* for phasing irrelevant while at the same time sanctioning *rate* increases eliminating phasing. From this, it necessarily follows that the "breakeven" directive of the statute has, under the Court of Appeals' decision, a different meaning when applied to temporary than when applied to permanent rates. Yet the court entirely failed to explain why this should be true either as a matter of statutory language or Congressional intent.

YOYO EFFECT ON RATES PERMITTED BY COURT OF APPEALS' INTERPRETATION OF TEMPORARY RATEMAKING POWER 1/




1/ Rates are from the Federal Register Notice of February 6, 1971 (Exhibit 2 to the Complaint).
2/ This rate, along with other third-class rates, is involved in this suit.
3/ This rate, which the Postal Service has not raised, is shown for comparative purposes.
4/ Assumes new permanent rates go into effect July 1, 1972.

## CONCLUSION

The Court of Appeals has expanded the temporary ratemaking power of the Postal Service beyond that obtaining in any other ratemaking situation and in a fashion which encourages the use of temporary rates as a device to avoid due process protections and regulatory supervision, a device to cover inefficiency, and a device to override Congress' efforts to protect ratepayers from large, abrupt rate increases.

The development and effectiveness of regulatory schemes can often be traced to the initial decisions which inevitably shape all that comes thereafter. In this case involving the first appellate decision construing the Postal Reorganization Act of 1970, the Court of Appeals has initiated a march down the wrong path, toward a free-wheeling exercise of ratemaking power by the Postal Service at the expense of its customers, and away from the regulatory process charted by Congress. For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DIRECT MAIL ADVERTISING ASSOCIATION, INC., ET AL.,

*Plaintiffs,*

v.

**Civil Action No. 2049-71**

UNITED STATES POSTAL SERVICE, ET AL.,

*Defendants.*

## ORDER FOR SUMMARY JUDGMENT

This matter having come on for hearing before the Court on the Plaintiff's Motion for Summary Judgment or in the Alternative for a Preliminary Injunction, and the Defendants' Motion to Dismiss or in the Alternative for Summary Judgment, and the Court having considered the pleadings and briefs, and having heard the argument of counsel, and being fully advised of the premises, it is this 17th day of January, 1972, hereby

ORDERED AND ADJUDGED,

(1) That the increase in temporary rates for third-class mail announced by the Defendant United States Postal Service on December 24, 1971, to become effective on January 24, 1972, would violate the Postal Reorganization Act by improperly modifying or eliminating the phasing required for those rates; and that, so long as temporary rates for third-class mail remain in effect, they must reflect the phasing required by the Postal Reorganization Act of the permanent rates which the Postal Service has requested the Postal Rate Commission to approve; and that accordingly the Postal Service shall not increase presently existing temporary

rates for third-class mail to the second-step phased level prior to May 16, 1972; and that the Plaintiffs' Motion for Summary Judgment regarding temporary rates is granted in accordance with the foregoing without prejudice to an application to this court for a modification of this Order in the event future Congressional action with respect to appropriations for third-class mail matter should make modification appropriate.

(2) The Defendants' Motion for Summary Judgment is denied.

(3) The Defendants' Motion to Dismiss the action as to permanent rates is granted and the action as to permanent rates is dismissed without prejudice.

JUDGE

No Objection to Form:

Counsel for Defendants

Date: January 17, 1972

## APPENDIX B

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 72-1065

DIRECT MAIL ADVERTISING ASSOCIATION INC., ET AL.,

v.

UNITED STATES POSTAL SERVICE, ET AL., APPELLANTS

---

Appeal from the United States District Court
for the District of Columbia

---

Decided February 22, 1972

*Mr. Joseph B. Scott*, Attorney, Department of Justice, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of Court, with whom *Mr. L. Patrick Gray, III*, Assistant Attorney General, *Messrs. Harold H. Titus, Jr.*, United States Attorney, *Alan S. Rosenthal*, Attorney, Department of Justice, *Marvin H. Morse*, Assistant General Counsel, United States Postal Service, and *Israel Convisser*, Attorney, United States Postal Service, were on the brief, for appellants. *Mr. Morton Hollander*, Attorney, Department of Justice, also entered an appearance for appellants.

*Mr. David E. McGiffert*, with whom *Messrs. William D. Iverson* and *J. Edward Day* were on the brief, for appellees.

Before McGowan, MacKinnon and Robb, *Circuit Judges*.

MacKinnon, *Circuit Judge:* The Direct Mail Advertising Association, and several other substantial users of third-class postal services (hereafter, Direct Mailers) herein challenge the right of the United States Postal Service (Postal Service) under the Postal Reorganization Act of 1970, 39 U.S.C. § 101 *et seq.* (1970) to impose certain rates temporarily upon third-class mail which the Postal Service has requested the Postal Rate Commission to recommend as permanent rates. The Direct Mailers contend that the temporary increase in such rates, over existing rates, must be phased in as provided for permanent rates by 39 U.S.C. § 3626; while the Postal Service contends it is authorized temporarily to impose the full rate, without phasing, under the authority of 39 U.S.C. § 3641. We accept the interpretation of the statute that conforms to the general position of the Postal Service on this issue and accordingly reverse the decision of the District Court granting summary judgment in favor of Direct Mailers.

I

When Congress on August 12, 1970 enacted the law establishing the United States Postal Service (hereafter, the Act), one of its principal goals was that eventually the Postal Service would become self-sufficient: be able to operate on the revenue received from postal rates and fees without the assistance of congressional appropriations. To this end the Congress declared in 39 U.S.C. § 3621:

> Postal rates and fees shall be reasonable and equitable and sufficient to enable the Postal Service under

> honest, efficient, and economical management to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States. Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service. . . . (84 Stat. 760)

Thus, the sufficiency of the revenue to be received from postal rates is all important. It is also important that such rates be fair to those using the mails. To accomplish both of these objectives Congress provided that postal rates would be fixed by the "Governors"[1] of the Postal Service in accordance with procedures prescribed by the Act.[2] Under such procedures the Postal Service requests the Postal Rate Commission (hereafter the Commission) to submit a recommended decision on changes in a postal rate. Upon receipt of this request the Commission, after opportunity for hearing, shall make a recommended decision in accordance with the policies of the Act.[3] The Commission transmits its recommended decision to the Governors,[4] who approve the recommended decision and order it placed in effect, or reject, modify or take other specified action.[5]

The Act then, under the heading "SUBCHAPTER II.—

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[1] 39 U.S.C. § 102(3) provides:

> As used in this title—
>
> * * * * * *
>
> (3) "Governors" means the 9 members of the Board of Governors appointed by the President, by and with the advice and consent of the Senate, under section 202(a) of this title. (84 Stat. 720)

[2] 39 U.S.C. § 3621 (84 Stat. 760).

[3] *Id.* §§ 3622, 3624 (84 Stat. 760, 761).

[4] *Id.* § 3624(c) (84 Stat. 761).

[5] *Id.* § 3625 (84 Stat. 762).

PERMANENT RATES AND CLASSES OF MAIL," in section 3626 provides:

> § 3626. *Reduced Rates.*
>
> If the rates of postage for [certain classes of mail including third-class], as such rates existed on the effective date of this subchapter, are, on the effective date of the first rate decision under this subchapter affecting that class or kind, less than the rates established by such decision, a separate rate schedule shall be adopted for that class or kind effective each time rates are established or changed under this subchapter, with annual increases as nearly equal as practicable, so that—
>
> • • • • • •
>
> (2) the rates for [applicable "classes of mail] shall be equal," on and after the first day of the fifth year following the effective date of the first rate decision applicable to that class or kind, to the rates that would have been in effect for such mail if this subsection had not been enacted. (84 Stat. 762)

This section of the Act cushions the impact of the initial changes in permanent rates applicable to third-class mail by requiring that the increase over prior rates be added to the user's rates in substantially equal installments over a five year period—thus the full impact of the increase is not felt until the fifth year. This is termed "phasing-in" the full rate.

Under the scheme of the Act, Congress is authorized to appropriate moneys from time to time equal to the deficiency in revenue which is caused by "phasing-in" part of the rate.[6] Thus the Act contemplates that Congress will

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[6] 39 U.S.C. § 2401(c) provides:

> § 2401. *Appropriations.*
>
> • • • • • •
>
> (c) There are authorized to be appropriated to the Postal Service each year a sum determined by the Postal Service to be equal to the difference between the

appropriate moneys equal to the revenue foregone by the the phasing of rates, sufficient to permit the solvent operation of the Postal Service. If Congress fails to appropriate such moneys, the postal rate for the affected class may be adjusted to provide sufficient revenue to make up the deficiency.[7] In other words, the Postal Service would then increase the rates so as to receive the needed revenue from the users of the class of mail to which such rates were applicable.

In addition to the above described procedures for permanent rates, the Act also provides for temporary rates in certain instances. These provisions are contained in a separate subchapter immediately following the subchapter on permanent rates. It provides:

SUBCHAPTER III—TEMPORARY RATES AND CLASSES

§ 3641. *Temporary changes in rates and classes.*

(a) If the Postal Rate Commission does not trans-

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revenues the Postal Service would have received if sections 3217, 3403-3405, and 3626 of this title and the Federal Voting Assistance Act of 1955 had not been enacted and the estimated revenues to be received on mail carried under such sections and Act. (84 Stat. 743).

[7] 39 U.S.C. § 3627 provides:

§ 3627. *Adjusting free and reduced rates.*

If Congress fails to appropriate an amount authorized under section 2401(c) of this title for any class of mail sent at a free or reduced rate under section 3217, 3403-3405, or 3626 of this title, or under the Federal Voting Assistance Act of 1955, the rate for that class may be adjusted in accordance with the provisions of this subchapter so that the increased revenues received from the users of such class will equal the amount for that class that the Congress was to appropriate. (84 Stat. 763).

> mit to the Governors within 90 days after the Postal Service has submitted . . . to the Commission a request for a recommended decision on a change in rates of postage . . ., the Postal Service, upon 10 days' notice in the Federal Register, may place into effect temporary changes in rates of postage . . . it considers appropriate to carry out the provisions of this title. Any temporary change shall be effective for a period ending not later than 30 days after the Commission has transmitted its recommended decision to the Governors.
>
> • • • • • •
>
> (c) A rate of postage for a class of mail or a fee for a postal service under a temporary change under this section may not exceed the lesser of (1) the rate or fee requested for such class or service, or (2) a rate or fee which is more than one-third greater than the permanent rate or fee in effect for that class or service at the time a permanent change in the rate or fee of such class or service is requested under section 3622 of this title. (84 Stat. 763)

Thus, if the Postal Rate Commission does not act on a rate request by the Postal Service within 90 days of its submission, Subchapter III gives the Postal Service, after ten days' notice, authority to "place into effect temporary changes in rates . . . it considers appropriate to carry out the provisions of this title. Any temporary change shall be effective for a period ending not later than 30 days after the Commission has transmitted its recommended decision to the Governors." [8]

The temporary rate which the Postal Service may put into effect is limited by 39 U.S.C. § 3641(c), so that it may not exceed "the lesser of (1) the rate or fee requested for such class or service, or (2) a rate or fee which is more than *one-third greater* than the permanent rate or fee in effect for that class or service at the time a permanent change in the rate or fee of such class or service

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[8] 39 U.S.C. § 3641(a) (84 Stat. 763).

is requested [of the Postal Rate Commission]." (Emphasis added.) It is the relationship between this provision concerning temporary rates, and the one concerning phasing of permanent rates contained in Subchapter II, that raises the issues here presented. The Direct Mailers contend that the phase-in requirement of section 3626, contained in the subchapter on PERMANENT RATES, also applies to temporary rates placed into effect under section 3641, part of the subchapter on TEMPORARY RATES.

## II

The Postal Service filed its initial request for rate increases with the Postal Rate Commission on February 1, 1971. The full permanent rate requested for one of the types of third class mail was 28¢ as compared with a prior rate of 22¢. The Postal Rate Commission not having acted within 90 days, the Postal Service put a temporary rate increase into effect on May 16, 1971. This action increased the rate to 23¢, the level that would be permitted on the first step of the phase-in of the requested permanent rate. The Postal Service then made a request to Congress for appropriations that included an amount equal to the revenue that would be foregone by the operation of a first step rate increase for this class of mail. After Congress made its appropriation, the Postal Service construed the amount actually appropriated to have omitted the money requested for third class rates.[9] It then announced that it would in-

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[9] The parties contest whether the money to compensate for phasing third class mail was actually excluded from the lump sum that Congress appropriated, and whether it is the Postal Rate Commission or the Postal Service that must make the determination in the first instance that appropriations have failed. Since we have concluded that, in any case, phasing is not required by the Act for temporary rates, we do not reach either question.

crease the temporary rate for third class mail to the full amount of the requested permanent rate—28¢. The Direct Mailers[10] then filed this suit in the District Court for declaratory and injunctive relief, seeking, *inter alia*, to establish that temporary rates are subject to the phasing requirement of section 3626.

The District Court granted the appellees' motion for summary judgment with respect to the question of phasing temporary rates. The order enjoined the Postal Service from putting into effect a temporary rate higher than the first step level of the permanent rates requested until the first step rates had been in effect for one year—reflecting the equal annual installment requirement of section 3626. A stay of the order was denied, and this appeal followed. We denied a motion by the Postal Service for summary reversal or for a stay pending appeal, but—in light of the importance of the matter presented by this case—we have expedited its consideration on the merits.

## III

This brings us to an examination of the statute to determine whether temporary rates are subject to the phase-in requirements applicable to permanent rates.

The language of the section that deals with phasing, section 3626, offers no indication that it should apply to temporary rates. Indeed, the requirement only comes into play *after* the first rate decision is made under Subchapter II—which deals exclusively with permanent rates. This first rate decision has not yet been rendered. Appellees, however, seek to impose the phasing requirement on temporary rates through the section which limits the

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[10] The plaintiffs-appellees are Direct Mail Advertising Association, Inc., GEM International, Inc., National Broadcasting Company, Inc., and The Associated Third Class Mail Users.

amount by which a temporary rate can exceed prior rates. This is section 3641(c), above quoted, which provides that a temporary rate shall not exceed the lesser of a one-third rate increase or "the *rate or fee requested* for such class or service." Appellees argue that the "rate or fee requested" should be read to mean the level of the annual step authorized to be imposed under section 3626 with respect to the full permanent rate. This would limit the Postal Service, under the factual circumstances here existing, to imposing a temporary rate which did not exceed the first year rate that would be permitted under the phasing requirements applicable to permanent rates. We find this suggested interpretation to be incompatible with the intent expressed by Congress throughout the Act. We interpret the "rate or fee requested" in section 3641 of the Act to refer to the full permanent rate requested.

The scheme of the Postal Reorganization Act is for the Postal Service to request the Postal Rate Commission to submit to the Governors a recommended rate decision.[11] Section 3626 only provides that if "the rates established by the [first recommended decision]"[12] represent an increase over existing rates then "a separate rate schedule" shall be adopted representing the reduced level of phased in rates.[13] While a metaphysical analysis might come to the conclusion that a request for a full rate, subject to a reduction by the operation of a separate provision means that the reduced rate is the rate requested, a common

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[11] 39 U.S.C. § 3622(a) (1970), (84 Stat. 760).

[12] The language of the Act leads us to conclude that the Postal Rate Commission's decision *establishes* the full permanent rate, and only afterward is a reduced rate schedule put into effect. That the rate *established* is not a phased rate infers that the rate *requested* is not a phased rate either.

[13] The title of section 3626 is "Reduced rates."

sense interpretation of the language of the statute leads to the opposite result.

We also note that the request of the Postal Service with respect to its third class mail regular bulk rates set forth "28" under the caption "Proposed Full Rates (cents)." Thus, the Postal Service, in this instance, interpreted the Act as calling for it to request the full permanent rate (not the reduced phased-in rate), and that is the rate it did request (App. p. 45). The document also requested full permanent rates in other mail classes. If Congress meant that the phasing requirement, which on its face does not become operative until the "first rate decision" would be applicable to temporary rates in effect prior to that decision, we believe it would have been more explicit in expressing this in section 3641(c).

Congress did consider the problem of the impact of temporary rates on users, and acted to insure that they did not have an unduly disruptive effect by limiting them to the lesser of the full requested rate or a one-third increase. The language constituting the limitation on temporary rates appeared for the first time in the Conference Committee. The House bill had no phasing requirements at all,[14] and the Senate bill had only a time limit on increases represented by temporary rates.[15] The appearance of the provision limiting temporary rates in a separate subchapter, from the subchapter providing for phasing, leads to the conclusion that Congress relied on the restrictions it imposed on temporary rates in section 3641(c), as being the exclusive limitations it intended to apply to the imposition of temporary rates.

In formulating the level of temporary rates, the Postal

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[14] H.R. 17070, 91st Cong., 2d Sess. (1970).

[15] S. 3842, 91st Cong., 2d Sess. (1970).

Service may place into effect that rate "it considers appropriate to carry out the provisions of this title."[16] We conceive it to be a central purpose of the title to place the Postal Service on a self-sufficient basis. The Direct Mailers argue that the intent of Congress to cushion the impact of new rates by phasing is controlling. However, while we recognize its force, we consider it to be subordinate to the intent that the Postal Service be as near self-sufficient as possible. Temporary rates were one means to this end; reduced rates were contemplated only insofar as appropriations would counterbalance their effect so as not to obstruct the primary goal. This mandate to the Postal Service with respect to the level at which it may set temporary rates would be frustrated by requiring these rates to be phased, since that would unduly burden the fiscal operation of the Postal Service. The appropriations process, on which phasing is contingent, is not well suited for supplying revenue deficiencies in connection with a situation calling for temporary rates. If Congress were to make an appropriation for revenue foregone with respect to temporary rates—prior to the time that a final decision is reached by the Postal Rate Commission—it would be placed in the position of having to assume the propriety of the requested full rate in order to have a base from which to compute the reduction represented by phasing.[17]

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[16] 39 U.S.C. § 3641(a) (1970), (84 Stat. 763).

[17] This concern was voiced in Congressional debate over the appropriation request by the Postal Service when Senator Boggs stated "if [Congress] spelled out how much money should be spent to aid the phase in of mail rates it would, in effect, be giving direction as to what these rates should be." 117 Cong. Rec. S 10301 (daily ed. June 29, 1971). In addition to the problems presented by assuming the propriety of the rates presented by the Postal Service, an appropriation for temporary rates which are subject to phasing confronts

Appellees point out, quite correctly, that an interpretation of the Act which allows the temporary rate to equal the full permanent rate requested would give rise to a yo-yo effect; the rate would rise sharply to the full level, and on implementation of the Postal Rate Commission's final decision, would drop to the first phased level. While a "yo-yo" effect is not illegal per se, it is argued that such fluctuation of postal rates could not reasonably have been intended. As we have already noted, Congress did deal with the question of the initial effect of high temporary rates, and it is our interpretation of the Act that Congress chose to resolve it by absolute limits rather than by phasing.[18] Any disruption in the orderly progression of postal rate increases would be limited in any event—since temporary rates must end within thirty days of the Postal Rate Commission's decision. The legislation assumes that the Commission will perform its duty expeditiously and that the proceedings before the Commission would not be greatly protracted. Moreover, comparable swings in the level of the postal rates are otherwise contemplated in the Act, since appropriations could fail the first year, be forthcoming the second, and fail the third—all consistent with the other requirements of the budget.

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the difficulty of actually computing the amount of the annual increments in the phasing which determines the amount of revenue foregone. The imprecision in determining phased steps for temporary rates arises because section 3626 requires equal installments each year, until five years from the date of the first permanent rate decision—a date that has not yet arrived, and cannot be predicted.

[18] We note that under our interpretation of the Act, even postal users who are initially subject to full temporary rates will still be able to obtain a complete five years of the phasing requirement. Their monetary loss is measured only by the time value of the difference in cost between the phased rate and the full rate.

In accordance with the foregoing interpretation of the Act, we reverse the order of the District Court granting summary judgment to the appellees, and remand the case for proceedings consistent with this opinion.

*Judgment accordingly.*

## APPENDIX C

## UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 72-1065 September Term, 1971

Civil Action 2049-71

Direct Mail Advertising Association, Inc., et al.,

v.

United States Postal Service, et al.,

*Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: McGowan, MacKinnon and Robb, Circuit Judges.

### JUDGMENT

This case came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and this case is hereby remanded to the District Court for further proceedings

consistent with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

Nathan J. Paulson
Clerk

Dated: February 22, 1972

Opinion by Circuit Judge MacKinnon

[Filed February 22, 1972]

## APPENDIX D

## UNITED STATES COURT OF APPEALS

### FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 72-1065**
**Civil Action 2049-71**

**September Term, 1971**

Direct Mail Advertising Association, Inc., et al.,

v.

United States Postal Service, et al.,
*Appellants.* *Appellants.*

Before: McGowan, MacKinnon and Robb,
Circuit Judges

### ORDER

The Court has considered the petition for rehearing or recall of the mandate, and the opposition thereto. We decline to order rehearing, but a clarification of our original opinion is in order. The allegation that the temporary rates for third class mail instituted by the Postal Service were discriminatory in violation of 39 U.S.C. 403 (1970) was not in issue when we first heard this case. It was therefore neither considered not disposed of by the original opinion.

*Per Curiam*

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# APPENDIX E

## EXCERPT FROM THE POSTAL REORGANIZATION ACT
(Footnotes added for ease of comprehension)

## Chapter 36. - POSTAL RATES, CLASSES, AND SERVICES

* * *

## SUBCHAPTER II - PERMANENT RATES AND CLASSES OF MAIL

" 3621. Authority to fix rates and classes

"Except as otherwise provided, the Governors are authorized to establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services in accordance with the provisions of this chapter. Postal rates and fees shall be reasonable and equitable and sufficient to enable the Postal Service under honest, efficient, and economical management to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States. Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service. For purposes of this section, 'total estimated costs' shall include (without limitation) operating expenses, depreciation on capital facilities and equipment, debt service (including interest, amortization of debt discount and expense, and provision for sinking funds or other retirements of obligations to the extent that such provision exceeds applicable depreciation charges), and a reasonable provision for contingencies.

" 3622. Rates and Fees

"(a) From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in

accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

"(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

"(1) the establishment and maintenance of a fair and equitable schedule;

"(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

"(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

"(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

"(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

"(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

"(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services; and

"(8) such other factors as the Commission deems appropriate.

* * *

" 3624. Recommended decisions of the Commission

"(a) The Postal Rate Commission shall promptly consider a request made under section 3622 or 3623 of this title, except that the Commission shall not recommend a decision

until the opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mails, and an officer of the Commission who shall be required to represent the interests of the general public.

"(b) In order to conduct its proceedings with utmost expedition consistent with procedural fairness to the parties, the Commission may (without limitation) adopt rules which provide for –

"(1) the advance submission of written direct testimony;

"(2) the conduct of prehearing conferences to define the issues, and for other purposes to insure orderly and expeditious proceedings;

"(3) discovery both from the Postal Service and the parties to the proceedings;

"(4) limitation of testimony; and

"(5) the conduct of the entire proceedings off the record with the consent of the parties.

"(c) The Commission shall transmit its recommended decision in a rate, fee or classification matter to the Governors. The recommended decision shall include a statement specifically responsive to the criteria established under section 3622 or 3623, as the case may be.

" 3625. Action of the Governors

"(a) Upon receiving a recommended decision from the Postal Rate Commission, the Governors may approve, allow under protest, reject, or modify that decision in accordance with the provisions of this section.

"(b) The Governors may approve the recommended decision and order the decision placed in effect.

"(c) The Governors may, under protest, allow a recommended decision of the Commission to take effect and (1) seek judicial review thereof under section 3628 of this title, or (2) return the recommended decision to the Commission for reconsideration and a further recommended decision.

which shall be acted upon under this section and subject to review in accordance with this section 3628 of this title.

"(d) The Governors may reject the recommended decision of the Commission and the Postal Service may resubmit its request to the Commission for reconsideration. Upon resubmission, the request shall be reconsidered, and a further recommended decision of the Commission shall be acted upon under this section and subject to review in accordance with section 3268 of this title. However, with the unanimous written concurrence of all of the Governors then holding office, the Governors may modify any such further recommended decision of the Commission under this subsection if the Governors expressly find that (1) such modification is in accord with the record and the policies of this chapter, and (2) the rates recommended by the Commission are not adequate to provide sufficient total revenues so that total estimated income and appropriations will equal as nearly as practicable estimated total costs.

"(e) The decision of the Governors to approve, allow under protest, reject, or modify a recommended decision of the Commission shall be in writing and shall include an estimate of anticipated revenue and a statement of explanation and justification. The decision, the record of the Commission's hearings, and the Commission's recommended decision shall be made generally available at the time the decision is issued and shall be printed and made available for sale by the Public Printer within 10 days following the day the decision is issued.

"(f) The Board shall determine the date on which the new rates, fees, the mail classification schedule, and changes in such schedule under this subchapter shall become effective.

" 3626. Reduced rates

"If the rates of postage for any class of mail or kind of mailer under former sections 4358, 4359, 4421, 4422, 4452, or 4554 of this title, as such rates existed on the effective date of the first rate decision under this subchapter, are, on the effective date of the first rate decision under this subchapter, affecting that class or kind, less than the rates

established by such decision, a separate rate schedule shall be adopted for that class or kind effective each time rates are established or changed under this subchapter, with annual increases as nearly equal as practicable, so that –

> "(1) the revenues received from rates for mail under former sections 4358, 4452 (b) and (c), and 4554 (b) and (c)* shall not, on and after the first day of the tenth year following the effective date of the first rate decision applicable to that class or kind, exceed the direct and indirect postal costs attributable to mail of such class or kind (excluding all other costs of the Postal Service); and
>
> "(2) the rates for mail under sections 4359, 4421, 4442, 4452 (a), and 4554 (a)** shall be equal, on and after the first day of the fifth year following the effective date of the first rate decision applicable to that class or kind, to the rates that would have been in effect for such mail if this subsection had not been enacted.

No person who would have been entitled to mail matter under former section 4359 of this title shall mail such matter at the rates provided under this subsection unless he files annually with the Postal Service a written request for permission to mail matter at such rates.

" 3627. Adjusting free and reduced rates

"If Congress fails to appropriate an amount authorized under section 2401 (c) of this title for any class of mail sent at a free or reduced rate under section 3217, 3403-3405, or 3626 of this title, or under the Federal Voting Assistance

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*These sections refer respectively to second-class mail within county of publication, bulk third-class mail of qualified non-profit organizations, special fourth-class mail of non-profit organizations.

**These sections refer respectively to second-class rates beyond county of publication, controlled circulation mail (Sections 4421-22), all third-class mail other than non-profit, all special fourth-class mail other than non-profit.

Act of 1955, the rate for that class may be adjusted in accordance with the provisions of this subchapter so that the increased revenues received from the users of such class will equal the amount for that class that the Congress was to appropriate.

" 3628. Appellate review

"A decision of the Governors to approve, allow under protest, or modify the recommended decision of the Postal Rate Commission may be appealed to any court of appeals of the United States, within 15 days after its publication by the Public Printer, by an aggrieved party who appeared in the proceedings under section 3624 (a) of this title. The court shall review the decision, in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, except as otherwise provided in this section, on the basis of the record before the Commission and the Governors. The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision. The court shall make the matter a preferred cause and shall expedite judgment in every way. The court may not suspend the effectiveness of the changes, or otherwise prevent them from taking effect until final disposition of the suit by the court. No court shall have jurisdiction to review a decision made by the Commission or Governors under this chapter except as provided in this section.

"SUBCHAPTER III—TEMPORARY RATES AND CLASSES

" 3641. Temporary changes in rates and classes

"(a) If the Postal Rate Commission does not transmit to the Governors within 90 days after the Postal Service has submitted, or within 30 days after the Postal Service has resubmitted, to the Commission a request for a recommended decision on a change in rates of postage or in fees for postal services, or on a change in the mail classification schedule (after such schedule is established under section 3623 of this title), the Postal Service, upon 10 days' notice in the Fedearl

Register, may place into effect temporary changes in rates of postage, in fees for postal service, or in the mail classification schedule it considers appropriate to carry out the provisions of this title. Any temporary change shall be effective for a period ending not later than 30 days after the Commission has transmitted its recommended decision to the Governors.

"(b) If, under section 3628 of this title, a court orders a matter returned to the Commission for further consideration, the Postal Service, with the Consent of the Commission, may place into effect temporary changes in rates of postage, in fees for postal services, or in the mail classification schedule.

"(c) A rate of postage for a class of mail or a fee for a postal service under a temporary change under this section may not exceed the lesser of (1) the rate or fee requested for such class or service, or (2) a rate or fee which is more than one-third greater than the permanent rate or fee in effect for that class or service at the time a permanent change in the rate or fee of such class or service is requested under section 3622 of this title."

# In the Supreme Court of the United States

OCTOBER TERM, 1971

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No. 71-1432

DIRECT MAIL ADVERTISING ASSOCIATION, INC., ET AL., PETITIONERS

*v.*

UNITED STATES POSTAL SERVICE, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners are two associations of third-class mail users and two corporations that make substantial use of third-class mail service. They seek review of a decision of the court of appeals construing certain provisions of the Postal Reorganization Act of 1970, 39 U.S.C. 101, *et seq.* The specific issue presented concerns the power of the Postal Service to make temporary postage rate increases pending a

decision on permanent increases by the Postal Rate Commission and the Postal Service Governors. See generally 39 U.S.C. 3621-3625.

Petitioners contend here (Pet. 9), as they did below, that the requirement in Section 3626 of Subchapter II of the Act[1] that permanent increases in the postage rates of certain classes of mail, including the regular-rate third-class mail involved here, must be phased-in over a five or ten year period in annual installments as nearly equal as practicable, also applies to the temporary rate increases Congress authorized in Section 3641, which is part of Subchapter III—"TEMPORARY RATES AND CLASSES." In rejecting this contention and, instead, giving effect to what it termed the "common sense interpretation of the language of the statute" (Pet. App. B, 9b-10b), the court of appeals based its interpretation on the central purpose of the Act: the "plac[ing] [of] the Postal Service on a self-sufficient basis" (Pet. App. B, 11b).

2. The holding of the court of appeals—that phasing does not apply to temporary rate changes, and "that Congress relied on the restrictions it imposed on temporary rates in section 3641(c), as being the exclusive limitations it intended to apply to the imposition of temporary rates" (Pet. App. B, 10b)—is correct and further review is not warranted. Congress expressly indicated the monetary limitations applicable to temporary, as opposed to permanent, rate

[1] Subchapter II (Sections 3621-3628) is entitled PERMANENT RATES AND CLASSES OF MAIL.

increases. In Section 3641(c), those limitations are set forth in the following terms:

> A rate of postage for a class of mail or a fee for a postal service under a temporary change under this section may not exceed the lesser of (1) the rate or fee requested for such class or service, or (2) a rate or fee which is more than one-third greater than the permanent rate or fee in effect for that class or service at the time a permanent change in the rate or fee of such class or service is requested under section 3622 of this title.

Petitioners misconstrue this provision when they argue (Pet. 9) that "since Section 3626 requires phasing of permanent rates, the Postal Service's 'request' for permanent rate increases must as a matter of law involve a request for phased rates * * * [and] therefore the phasing requirement limits temporary as well as permanent rates." As the court of appeals noted (Pet. App. B, 9b, n. 12), "the rate *requested* is not a phased rate" (emphasis in original), but rather, the full permanent rate. Moreover, as the statute shows, Congress intended that, within the limits prescribed by Section 3641(c), the Postal Service management should have the means to obtain expeditiously revenue to meet the service's fiscal needs while formal revenue-producing procedures (*i.e.*, the permanent rate proceedings) are pending.

Petitioners suggest the possibility of abuse and disruption in connection with temporary rate-making (Pet. 17). But, as the court of appeals pointed out,

"Congress did consider the problem of the impact of temporary rates on users, and acted to insure that they did not have an unduly disruptive effect by limiting them to the lesser of the full requested rate or a one-third increase" (Pet. App. B, 10b). There is no basis in the Act or its legislative history to go beyond this express treatment of the problem by applying the phasing requirement of Subchapter III to the temporary rates. The rates involved here are within the only monetary limitations Congress has prescribed for temporary rates,[2] and until such time as a new permanent rate structure is approved and introduced, the Postal Service retains the right to operate on the basis of those rates.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

JUNE 1972.

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[2] For example, with respect to regular-bulk third-class mail, the current permanent rate is 22 cents per pound, the full permanent rate requested is 28 cents per pound, and the temporary rate at issue here is 28 cents per pound (Pet. App. B, 7b).

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IN THE

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OCTOBER TERM, 1971

No. 71-1432

DIRECT MAIL ADVERTISING ASSOCIATION, INC.,
ASSOCIATED THIRD CLASS MAIL USERS,
GEM INTERNATIONAL, INC.,
*Petitioners,*

v.

UNITED STATES POSTAL SERVICE, *et al.*,
*Respondents.*

## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

The Government's Memorandum in Opposition fails to deal with the arguments in the Petition. Instead, the Government merely recites certain statements by the Court of Appeals and concludes with the assertion that there is "no basis in the Act or its legislative history" to apply the phasing requirement to temporary rates. (Memorandum in Opposition, p. 4). This assertion is manifestly incorrect.

First, as the Court of Appeals noted, both the Act and its legislative history show a clear purpose to cushion rate increases through phasing.

Second, to get around this explicit Congressional policy, both the Court of Appeals and the Government refer to the fact that the temporary rate section appears in a different subchapter from the phasing provision. But the Act explicitly provides that "an inference of legislative construction is not to be drawn by reason of a

chapter [in the Act] in which a section is placed nor by reason of its caption or catchline." Postal Reorganization Act §11(b), Pub. L. 91-375.

Third, phasing is mandated by Section 3626 of the Act. It relates to the *timing*, not the amount, of a requested rate increase. Thus, to say, as does the Government, that the Act's limitation of temporary rates to the "rate requested" permits imposition of an unphased rate sidesteps the primary question at issue—whether as a matter of law, and in view of Congress' explicit intent to cushion the impact of rate increases, temporary rates must be timed in accordance with the phasing requirement. Resolution of this question is of substantial importance in determining the degree of unilateral and unregulated power which the new Postal Reorganization Act intended to confer on the Postal Service, this country's largest monopoly.

Respectfully submitted,

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